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SUPREME COURT GRANTED DISCRETIONARY REVIEW:
JANUARY 13, 2010
(FILE NO. 2009-SC-0634-D)

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000402-MR

CARLA BEACH

APPELLANT

v. APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 07-CI-00641

CAESARS RIVERBOAT
CASINO, LLC; AND HARRAH'S
ENTERTAINMENT, INC.

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: MOORE, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: Carla Beach appeals from the Shelby Circuit Court's order dismissing her action for lack of personal jurisdiction over appellees, Caesars

Riverboat Casino, LLC, (Caesars) and Harrah's Entertainment, Inc.¹ Beach argues

¹ Caesars Riverboat Casino, LLC, is a limited liability company formed under Indiana law; Harrah's Entertainment, Inc. is a Delaware corporation.

on appeal that the circuit court erred by dismissing her complaint for lack of personal jurisdiction over appellees. For the following reasons, we reverse and remand.

Beach alleges in her complaint that appellees own and operate a riverboat casino located just across the Kentucky state line in Elizabeth, Indiana, near Louisville, Kentucky.² Appellees' facilities include a casino, hotel, retail stores, and several restaurants. Beach alleges that on October 20, 2006, while dining at a buffet restaurant on appellees' property, she "slipped on butter that had been allowed to remain on the floor and fell violently to the floor, causing [her] to sustain serious injuries and damages." At the time of the incident, Beach was a resident of Shelby County, Kentucky. She also was a "frequent patron" of appellees' casino and a member of their player's club.³

Appellees immediately moved to dismiss Beach's complaint under Kentucky Rules of Civil Procedure (CR) 12.02, arguing that the Shelby Circuit Court lacked personal jurisdiction over them as neither entity owned or maintained property in Kentucky, nor had any employees or agents operating or conducting business in Kentucky. Beach argued, in response, that appellees had sufficient

² The riverboat casino is located in the Ohio River, a few feet from the Kentucky state line. In *Kentucky v. Indiana*, 474 U.S. 1, 106 S. Ct. 304, 88 L. Ed. 2d 1 (1985), Kentucky conceded that its border extended only to the low water mark of the Ohio River as it existed in 1792 (Joint Exhibit 50 to Special Master's Report), which arguably means that Kentucky does not own all of the Ohio River, just most of it. However, Kentucky and Indiana have concurrent jurisdiction over the Ohio River. *Id.* There are no allegations in this case that the riverboat casino is actually located in Kentucky.

³ The record reflects that Carla Beach was the holder of a Total Rewards gold card, which appears to be a rewards program sponsored by appellees to promote player participation and loyalty at the casino and related premises.

contacts with Kentucky for the court's exercise of personal jurisdiction over them. Specifically, Beach cited solicitations appellees sent directly to her, as well as more general advertising directed towards Kentucky residents. There was no discovery taken in this case regarding appellees' contacts in Kentucky.

Notwithstanding, the circuit court found that it lacked personal jurisdiction over appellees, holding that while there was "a strong argument to be made" that appellees purposefully availed themselves of the forum state, Beach's cause of action "did not arise from the direct mailings she received, the advertisements Caesar's directs toward Kentucky consumers, or any other contacts between Caesar's and Kentucky." This appeal follows.

Beach's sole argument on appeal is that the circuit court erred by dismissing her complaint for lack of personal jurisdiction over appellees. We agree.

It is well settled when considering a motion to dismiss under CR 12.02, the pleadings should be liberally construed in a light most favorable to the plaintiff and all allegations in the complaint are taken to be true. *Mims v. Western-Southern Agency, Inc.*, 226 S.W.3d 833 (Ky.App. 2007). The issues raised look solely to questions of law based upon the conclusions reached by the circuit court. The circuit court's conclusions of law are reviewed *de novo*. *Gosney v. Glenn*, 163 S.W.3d 894 (Ky.App. 2005), and *Revenue Cabinet v. Hubbard*, 37 S.W.3d 717 (Ky. 2000). Thus, our review will proceed *de novo* on the sole legal issue raised in

this appeal as to whether the trial court erred in dismissing this action for lack of personal jurisdiction over appellees.

Kentucky Revised Statutes (KRS) 454.210, Kentucky's long-arm statute, governs when Kentucky courts may exercise personal jurisdiction over nonresidents. The Kentucky Supreme Court has noted that this statute authorizes *in personam* jurisdiction:

[T]o reach the outer limits of the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution, and because of this breadth, our statutory requirements have merged into the federal due process analysis. For this reason, we “need only determine whether the assertion of personal jurisdiction violates constitutional due process.”

Cummings v. Pitman, 239 S.W.3d 77, 84-85 (Ky. 2007)(footnotes omitted).

Among the seminal cases discussing the due process clause and personal jurisdiction are *International Shoe Co. v. State of Wash., Office of Unemployment Compensation and Placement*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980). The cumulative interpretation of these precedents provides for a three-prong test to determine the minimum contacts with the forum necessary for a court to exercise personal jurisdiction over a nonresident. The Kentucky Supreme Court approved this three-prong test in *Wilson v. Case*, 85 S.W.3d 589 (Ky. 2002). Although this “minimum contacts” test was not applied by the Kentucky Supreme Court until *Wilson* in 2002, various panels of the Kentucky Court of Appeals had been utilizing the test since 1978. *See Tube Turns*

Division of Chemetron Corp. v. Patterson Co., Inc., 562 S.W.2d 99 (Ky.App. 1978).

In *Cummings*, 239 S.W.3d at 85, the Kentucky Supreme Court summarized the three-prong minimum contacts test as follows:

The first prong of the test asks whether the defendant purposefully availed himself of the privilege of acting within the forum state or causing a consequence in the forum state. The second prong considers whether the cause of action arises from the defendant's activities in the forum. The final prong requires the defendant to have a substantial enough connection to the forum state to make exercise of jurisdiction over the defendant reasonable. Each of these criteria represents a separate requirement, and jurisdiction will lie only where all three are satisfied. (Footnote omitted.)

This appeal centers upon the circuit court's interpretation and application of the second prong in this case. The circuit court concluded that the first prong had been satisfied and did not address the third prong since the court determined that the cause of action did not arise out of appellees' contacts in Kentucky as required in the second prong of the test. Thus, the focus of our review looks to whether the cause of action asserted by Beach in her complaint arises from appellees' activities in Kentucky.

Unfortunately, no discovery was taken in this case. The motion to dismiss was filed by appellees shortly after service of the complaint and no answer was filed. The case was immediately taken under submission by the circuit court. To say that the record on appeal is meager would be an overstatement. The entire record below consists of a total of fifty-eight pages.

However, Beach relies heavily upon the opinion recently rendered by the United States District Court for the Western District of Kentucky in *Ford v. RDI/Caesars Riverboat Casino, LLC*, 503 F. Supp. 2d 839 (W.D. Ky. 2007). In *Ford*, the U.S. District Court, sitting in diversity, concluded that the federal court did have personal jurisdiction over Caesars in a wrongful death action that arose from an automobile accident in Floyd County, Indiana. Unlike this case, Judge Heyburn in *Ford*, permitted discovery on the personal jurisdiction issue and made substantial findings regarding Caesars' contacts in Kentucky that warranted personal jurisdiction in that action. The circuit court in this case discussed *Ford* at length in an attempt to distinguish *Ford* from this case. While we agree with the circuit court that a federal court's interpretation of Kentucky law is persuasive authority at best, in this case, we believe the federal court is correct in its analysis of Kentucky law which is directly on point and applicable to this case. *See Benningfield v. Pettit Env'tl. Inc.*, 183 S.W.3d 567 (Ky.App. 2005).

The *Ford* decision is of particular importance for our case because it involves Caesars, which is one of the same parties to this appeal, as well as the same gambling facilities and premises operated by Caesars in Elizabeth, Indiana. In *Ford*, Carla Burkhead, a Kentucky resident, was driving home from Caesars when she crossed the centerline of State Road 111 in Floyd County, Indiana, and hit the car of Charles Jayne, also a Kentucky resident. Jayne sustained fatal injuries from the accident. Burkhead was intoxicated at the time of the accident

and had been drinking at Caesars immediately prior to the accident. The administrator of Jayne's estate filed suit in Kentucky in federal court, alleging that:

Caesars served Burkhead alcohol when its employees knew or should have known that she was actually or apparently under the influence of alcohol and knew there was a reasonable likelihood that upon leaving the casino she would operate a motor vehicle.

Ford, 503 F. Supp. 2d at 841. Caesars filed a motion to dismiss for lack of personal jurisdiction like it did in the Shelby Circuit Court action filed by Beach. As noted, the federal court allowed discovery on the issue of personal jurisdiction. As a result of this discovery, the federal court made findings of fact in *Ford* that are most pertinent to this action. Specifically, the federal court found as follows:

Some part of Caesars' business is undeniably connected to and carried out in Kentucky. As Plaintiff's discovery has demonstrated, a large portion of Caesars' revenue comes from Kentucky. Various studies and reports have concluded that somewhere around fifty percent of Caesars' customers are from Kentucky. During discovery, Caesars provided forty-three pages of newspaper and billboard ads that appeared in Kentucky during the year leading up to the accident. The advertisements provided are not "exhaustive" and clearly Caesars has undertaken a comprehensive advertising campaign in Kentucky. Caesars earned at least \$109 million from Kentucky residents in 2000, demonstrating the financial significance of Kentucky residents to Caesars.

Caesars is also active in Kentucky as sponsor of events and donor of charitable contributions. In the twenty-four months preceding the accident, Caesars donated \$478,000 to such causes. The largest contribution by far was \$400,000 to the Kentucky Derby Festival. Finally, Caesars has an active direct mail marketing campaign to Kentucky residents. Both

Burkhead and Jayne received direct mail advertising from Caesars, both were regular patrons of Caesars, both were members of its Rewards Club for several years prior to the accident, and both were holder of Players Cards. In the twelve months prior to the accident, Burkhead visited the casino on average 13.5 times per month; in the same period, Jayne visited on average 1.5 times per month. Jayne's personal effects at his death included a Caesars "Certificate of Achievement" for completing a gaming instruction course, Caesars hotel receipts, and a wide variety of Caesars merchandise, including T-shirts, a key chain, drinking mugs, an umbrella, a fanny pack, a barbeque tool set, a watch, and a hat.

Ford, 503 F. Supp. 2d at 841-842.

In the case *sub judice*, the circuit court discusses these extensive findings of fact made in *Ford* regarding Caesars' contacts with Kentucky. The circuit court also notes that Beach states in her complaint that she is a "member of Caesar's [sic] Champions Club and receives direct mailings at her residence in Kentucky from Caesar's [sic] soliciting business." The circuit court further states that Beach alleges that Caesars "advertises throughout Kentucky to solicit residents of Kentucky to travel to Caesar's [sic] casino in Indiana." As noted previously, for purposes of the motion to dismiss, these allegations must be taken as true, especially since there is nothing in the record to refute these allegations and further, the findings by the federal court in *Ford* clearly support these allegations.

For our purposes in this case, this Court can take judicial notice of the adjudicated facts set out in *Ford* which are applicable to this case. Kentucky Rules of Evidence (KRE) 201. *See also Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260 (Ky.App. 2005). KRE 201(f) specifically provides that judicial notice may be

taken in any stage of the judicial proceeding. Adjudicated facts which this Court may take judicial notice of are specifically provided for in KRE 201(b), which reads as follows:

(b) *Kinds of facts.* A judicially noticed fact must be one not subject to reasonable dispute in that it is either:

(1) Generally known within the county from which the jurors are drawn, or, in a nonjury matter, the county in which the venue of the action is fixed; or

(2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

The adjudicative facts determined by the federal court in *Ford* as pertains to Caesars' contacts in Kentucky cannot be reasonably questioned in our opinion. These facts, coupled with the unrefuted allegations in Beach's complaint, provide this Court with a sufficient factual background to analyze appellees' contacts with Kentucky under the long-arm statute.

While the circuit court considered both the facts from *Ford* as well as those alleged by Beach in this case in considering Caesars' contacts with Kentucky, it nonetheless concluded that the cause of action set forth by Beach did not arise out of Caesars' contacts with Kentucky. The circuit court essentially concluded that Kentucky courts cannot obtain personal jurisdiction over nonresidents where the alleged tort occurs outside of Kentucky's borders. We believe that the circuit court erred in its interpretation of applicable Kentucky law on this issue for the reasons that follow.

We begin our analysis with *Mohler v. Dorado Wings, Inc.*, 675

S.W.2d 404 (Ky.App. 1984). *Mohler* is the first Kentucky case that we can locate that addresses the application of personal jurisdiction by a Kentucky court over a nonresident where the tort was committed outside of the state's boundaries. In *Mohler*, an action was asserted against Dorado for compensatory and punitive damages arising from the loss of jewelry in Mohler's luggage while it was being transported on Dorado's airline to the Virgin Islands. The circuit court dismissed the complaint for lack of personal jurisdiction. In reversing the circuit court, the Court of Appeals addressed the issue regarding the location of the tortious conduct for purposes of obtaining personal jurisdiction as follows:

Although the appellee argues that even if it is determined that it transacted business within the Commonwealth, there must be a determination that it caused some tortious injury in the Commonwealth for the court to acquire jurisdiction. We disagree. The statute does not provide for a two-fold test as to whether a court can acquire long-arm jurisdiction. If a defendant is transacting business within the Commonwealth, it is not necessary that a tort be committed herein. . . .

Mohler, 675 S.W.2d at 407. *Mohler* clearly holds that where a party is transacting business in Kentucky, it is not necessary for a tort claim to have arisen in Kentucky for the court to obtain personal jurisdiction over that party. In *Wilson*, the Kentucky Supreme Court, in discussing *Mohler*, strongly suggests that personal jurisdiction may be had over nonresidents for torts committed outside of Kentucky where the nonresident "repeatedly and systematically did business with Kentucky companies and consumers." *Wilson*, 85 S.W.3d at 595.

The personal jurisdiction rules set out in *Mohler* were recently amplified by the Kentucky Supreme Court in *Cummings v. Pitman*, 239 S.W.3d 77 (Ky. 2007). In *Cummings*, the Kentucky Supreme Court concluded that a lawyer acting as trustee for a New York trust that was created in New York and administered in New York under New York law, who otherwise had no contact with Kentucky other than executing the trust agreement during one short visit to Kentucky, constituted sufficient minimum contacts within Kentucky to satisfy the second prong of the minimum contacts test to warrant personal jurisdiction over the trustee for an alleged breach of fiduciary duty in Kentucky. The Supreme Court specifically made the following observation:

The second prong of the minimum contacts test requires the court to decide whether the cause of action arises from the defendant's activities in the state. Interpreting this criterion, the United States Court of Appeals for the Sixth Circuit has recognized, “Only when the operative facts of the controversy are not related to the defendant's contact with the state can it be said that the cause of action does not arise from that contact.” (Citing *Southern Mach. Co. v. Mohasco Industries, Inc.*, 401 F. 2d 374, 384 (6th Cir.1968)).

Cummings, 239 S.W.3d at 88. Like in the *Ford* case, Caesars’ contact with Kentucky did not “cause” the accident in the traditional meaning of that word. However, the systematic and continuous nature of the contacts by Caesars most clearly contributed to Beach’s presence on Caesars’ premises in Elizabeth, Indiana, on October 20, 2006, when Beach suffered her injuries at Caesars restaurant. Based upon the authority cited, we believe the circuit court clearly erred in

concluding that the cause of action did not arise from Caesars' contacts with Kentucky. If we were to agree with the circuit court's reasoning, arguably a Kentucky court could never assert long-arm personal jurisdiction over an out-of-state defendant for a negligence action that arose outside of Kentucky's border. In other words, if a Kentucky resident is targeted and induced by Caesars to utilize Caesars' gambling facilities, including its restaurants, and is then injured as a result of Caesars' negligence, the Kentucky resident would have no redress in Kentucky courts for his injuries. This is contrary to the law of Kentucky in our opinion.

The operative facts underlying Beach's cause of action are clearly related to Caesars' contact within the state of Kentucky. There can simply be no dispute that Caesars transacts substantial business in Kentucky and also maintains continuous and systematic contacts within Kentucky especially through the promotions, solicitations and inducement of Kentucky residents to utilize its facilities located a few feet from Kentucky's border. We believe these are precisely the type of contacts contemplated under Kentucky's long-arm statute to trigger personal jurisdiction. To conclude otherwise would mean that *in personam* jurisdiction in Kentucky under KRS 454.210 would not extend to the outer limits of the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution in this case or in any similar factual situation, but rather be limited to the banks (or the low water mark of 1792) of the Ohio River. Accordingly, the assertion of personal jurisdiction over appellees in this case does not violate constitutional due process and is otherwise reasonable.

For the foregoing reasons, we reverse the Shelby Circuit Court's dismissal of this action for lack of personal jurisdiction over appellees herein and remand for proceedings consistent with this opinion.

MOORE, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

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